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Bonhomme brings up topic of outer limits of fraud

In *Bonhomme v. St. James*, 2012 IL 112393 (May 24, 2012), the Illinois Supreme Court reiterated its previous holding in *Doe v. Dilling*, 228 Ill.2d 324, 348 (2008), that the tort of fraudulent misrepresentation does not extend to "purely personal settings." Specifically, *Bonhomme* suggests that a viable fraud claim must arise from a setting that is "commercial, transactional or regulatory." The "regulatory" prong of this test is not clearly defined and will likely require further explanation in future cases.

Before *Dilling*, the appellate court rendered arguably inconsistent decisions on whether fraud claims are viable outside of commercial settings. In *Roe v. Catholic Charities of the Diocese of Springfield*, 225 Ill. App. 3d 519, 523-31 (5th Dist. 1992), the appellate court recognized a cause of action against an adoption agency for fraud in a case where adoptive parents claimed that the adoption agency misrepresented their adoptive child's psychiatric health. The appellate court did not explain how this cause of action fit within the traditional parameters of fraud, except to say that the common law grows by responding to societal needs. Id. at 524. Over a decade later, the appellate court again recognized that a fraud claim "against an adoption agency is viable when the agency makes a false statement that affects the adoptive parents' right to make an informed decision." *Roe v. Jewish Children's Bureau of Chicago.* 339 Ill. App. 3d 119, 135 (1st Dist. 2003). Shortly thereafter, another district of the appellate court "decline[d] to extend the tort of fraudulent misrepresentation to encompass noncommercial and nonfinancial dealings between parties" and made no attempt to distinguish the adoption agency cases. *See Neurosurgery & Spine Surgery, S.C. v. Goldman*. 339 Ill. App. 3d 177, 187 (2d Dist. 2003) (affirming the dismissal of a patient's claim that a nurse had fraudulently induced her to republish a false statement about a physician).

In *Dilling*, the Supreme Court held that a woman did not have a valid fraud claim against the parents of her since-deceased fiancé, based upon their alleged misrepresentations about their son's HIV status. See *Dilling*, 228 Ill.2d at 342-51. The Supreme Court explained that under the facts presented — i.e., the defendants' alleged misrepresentation of their son's HIV status to his fiancée — it would be inappropriate to recognize a fraud claim outside of fraud's "general historical application to cases arising in the commercial context." Id. at 350-51. The Supreme Court rejected the plaintiff's argument, based on the adoption agency cases, that Illinois "has recognized the tort of fraudulent misrepresentation in purely personal settings." Id. at 348. The court stated that the adoption agency cases were "animated by the unique facts presented by adoption proceedings, wherein there is an inherent duty on the part of the agency to provide full and complete disclosure of the adopted child's background and history — information that is held exclusively by the agency." Id. The court added that "the state has a valid public policy interest in adoption proceedings, which are highly regulated." Id. For those reasons, the adoption agency cases were inapposite and did not justify the fiancée's fraud claim. Id.

Similarly, in *Bonhomme*, the Supreme Court held that the plaintiff did not have a valid fraud claim against a woman who duped the plaintiff into romantic correspondence with a fictional character. The court explained that the "crucial question" was "whether the facts at issue are purely personal in nature, or whether there exists some commercial, transactional, or regulatory component that moves them beyond the purely personal." See 2012 IL 112393, ¶ 38. This was "not a difficult question" under the facts presented, the court said, because "there is absolutely nothing of the commercial, transactional or regulatory at work." Id. The parties engaged in no "business dealings or bargaining and the veracity of representations made in the context of purely private personal relationships is simply not something the state regulates or in which the state possesses any kind of valid public policy interest." Id.

THE BOTTOM LINE

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> ***"The Supreme Court likely will be asked to decide the extent to which, if at all, the 'regulatory' category extends beyond the field of adoption."***

Bonhomme's "commercial, transactional or regulatory" formulation raises an obvious question: Other than adoption, what "regulatory" settings will support a fraud claim even if no commerce or transactions are implicated? This question is not purely academic. Its answer may have very significant consequences for regulated nonprofit entities in Illinois.

One thing is clear: The "regulatory" category of the *Bonhomme* test is based on the adoption cases. A plaintiff who wants his or her fraud claim to fit within the "regulatory" category of the *Bonhomme* test, therefore, would be well advised to compare the defendant to an adoption agency, in the sense that (i) the defendant is highly regulated by the state, (ii) the defendant has a monopoly on information that is necessary for the plaintiff to make an informed decision on a potentially life-altering event and (iii) making the defendant vulnerable to a fraud claim would advance an important public policy. Meeting these criteria might justify a fraud claim even if the surrounding circumstances are neither commercial nor transactional.

The Supreme Court likely will be asked to decide the extent to which, if at all, the "regulatory" category extends beyond the field of adoption. Indeed, by referring in *Bonhomme* to "regulatory" settings, instead of merely limiting the adoption cases to the unique field of adoption, the Supreme Court effectively invited further litigation over the extent to which Illinois recognizes fraud claims in noncommercial and nontransactional settings. Unlike *Dilling* and *Bonhomme*, the next case to test the outer limits of fraud may present a more challenging fact pattern, one that is more difficult to write off as a "purely personal" matter.